OFFICE OF THE CITY CLERK

REPORT

REPORT TO THE COMMITTEE ON RULES, FINANCE AND INTERGOVERNMENTAL RELATIONS

DATE: APRIL 14, 1999 REPORT NO: 99-02

SUBJECT: AMENDMENTS TO THE CITY ELECTIONS CODE, CHAPTER II, ARTICLE 7 OF THE SAN DIEGO MUNICIPAL CODE, PHASE 2, DIVISION 21 AND DIVISION 29

ISSUE

As you are aware, the City Clerk has begun the process of review and update to the city's current election code, Chapter II, Article 7 of the San Diego Municipal Code. A comprehensive review of the complete code has not been attempted in the thirty-one years it has been in place. In the past several years, the City Clerk has recognized the need to review and update the code to address the following: changes in state law which impact local law; processes that are not articulated in the code, or that are not clearly articulated; and problems in administration of the code. In order to accomplish this task, code amendments will be proposed in three separate phases.

The proposals in this report include the second phase or our recommendations and deal with Division 21--Nominations; and Division 29--Campaign Control Ordinance. It is anticipated that these proposals will be ready for Rules Committee discussion in June of this year. Before proceeding with Phase 2, however, we are requesting direction from the Rules Committee on potential proposals, which include several substantive changes to the city's election laws. A variety of potential substantive changes to these two divisions are discussed below.

RECOMMENDATION

Provide direction to the City Clerk on the specific proposals listed below. The Council may also wish to direct the Clerk to make additional changes as well.

PHASE TWO DISCUSSION

Nominations Division Proposals

There are three substantive changes to Division 21 on Nominations discussed here. It would be desirable to have amendments to the Nominations division in place at least two months prior to the opening of the nomination period for the March, 2000, elections so that staff can prepare accordingly. Since the nomination period for the election opens on November 10, 1999, proposals would have to be adopted by the City Council by early August. Each of the three proposals is discussed briefly below.

- Eliminate the separate petitions "in-lieu-of" the candidate filing fee and provide instead that excess signatures collected on the nominating petitions may be used to offset the filing fee.

- Reduce to 100 (from 200) the number of nominating signatures required of City Council candidates to qualify for the ballot. Reduce to 200 (from 300) the number of nominating signatures required of Mayoral and City Attorney candidates to qualify for the ballot.

- Limit the scope of the nominations process to city elective officers including the Mayor, City Council members and the City Attorney, by eliminating references to the Board of Education.

Proposal 1: Eliminate the separate petitions "in-lieu-of" the candidate filing fee and provide instead that excess signatures collected on the nominating petitions may be used to offset the filing fee.

This proposal has been suggested by individual Council members in the past. The idea has some appeal because it is cumbersome for candidates to carry two separate petitions with them in order to gather both nominating and "in lieu" signatures to offset the candidate filing fee. Under this proposal, candidates would be issued only one type of petition on which to collect their nominating signatures. Any valid signatures

gathered in excess of those used for qualification as a candidate would be used to offset the filing fee. This proposal results in a streamlined process for candidates. It means, however, that the same voter would not be able to sign for both the nominating and in-lieu process, as is currently the case. This would result in a candidate having to collect signatures from a greater number of voters to offset the filing fee.

Proposal 2: Reduce to 100 (from 200) the number of nominating signatures required of City Council candidates to qualify for the ballot. Reduce to 200 (from 300) the number of nominating signatures required of Mayoral and City Attorney candidates to qualify for the ballot.

This proposal was raised in the early 1990's, but has never been presented to the City Council for consideration. The City of San Diego requires many more nominating signatures for a candidate to qualify for the ballot than what is required for most other elective offices. Those offices require anywhere from twenty to sixty-five nominating signatures (see Attachment A).

Should the number of nominating signatures be reduced, the City would realize some savings in verification costs. These average about $2.00 per signature. The cost per qualified City Council candidate is, therefore, about $400, while the cost per qualified Mayor or City Attorney candidate is about $600. Assuming a total of twenty candidates were to qualify for four Council seats, and fifteen candidates were to qualify for the office of Mayor and City Attorney, the City could anticipate signature verification costs of approximately $17,000. If the signature requirement is reduced to 100 for City Council offices, and to 200 for the offices of Mayor and City Attorney, verification costs would be reduced by roughly 41 percent, for a savings of $7,000.

It should be noted that reducing the nominating signature requirements may result in the qualification of more candidates per election which, in turn, would raise the City's overall election costs. The City pays the cost of candidate ballot statements, which, in March 1996, averaged $12,341 for each candidate for Mayor and City Attorney, and $1,543 for each City Council candidate. Additional qualified candidates for these respective offices would increase the City's cost by these amounts.

If the Council supports this proposal to reduce the total number of nominating signatures required for candidacy, it would at least partly offset the additional voter signatures required in the first proposal.

Proposal 3: Limit the scope of the nominations process to city elective officers including the Mayor, City Council members and the City Attorney, by eliminating references to the Board of Education.

As part of the code update process, the City Clerk would like to clarify issues related to elections for the San Diego Unified School District Board of Education. Although the Board of Education is included in the City Charter, in 1984 they exercised their rights under the Education Code to consolidate their elections with the statewide primary and general elections. Because this action removed their elections from the regular City of San Diego municipal elections conducted by the City Clerk's Office, the Clerk asked to have the responsibility of calling and administering these elections shifted from the City Council and City Clerk to the School Board and the Registrar of Voters. The municipal code was amended in November, 1985, to shift this administrative responsibility.

Many changes have been made to the City Charter and the Municipal Code since that time, and many of the city's elections processes are different from those of the Board of Education. The Board of Education relies on several sources of law for their procedures including the Municipal Code, the Education Code and state law. Although the Registrar administers the elections for members of the Board of Education, County Counsel has opined that their elections are still governed by our municipal code for nominations and recall procedures, and that the City Clerk would handle any recall effort of a member of the Board of Education. Questions have arisen several times in the past few years about the recall issue. This has been somewhat confusing since the Board of Education is a separate entity and the City Clerk has limited knowledge of the demographics and other information that would be useful.

As part of the code update process, the Clerk is proposing to limit the scope of the city election code to the candidate races and recall elections for the Mayor, City Council and the City Attorney. County Counsel has opined that if our code did not provide for the elections of the Board of Education, the Board would then rely on procedures in state law. If the City Council supports this idea, it is our intent to bring it to the Board of Education for their consideration. Staff met recently with their general counsel to discuss this idea. Both the City Attorney and counsel to the Board of Education agree that these changes can be made without changes to the City Charter.

If both the Council and the Board of Education support this idea, the nomination procedures would be amended to specifically exclude references to the offices of members of the Board of Education. They would also be specifically excluded from recall provisions in Phase 3 of the code update. As a courtesy, we would consider retaining references to the Board of Education in the code, should the Board request it.

Campaign Control Ordinance Proposals

The campaign control ordinance was reviewed and amended in 1994. There are, however, three substantive changes proposed here. It is our suggestion that any amendments to the campaign control ordinance related to contribution limits be made effective following the elections in the year 2000, so as not to interfere with current fundraising for those elections. Each of the proposals is discussed briefly below.

- Make the threshold for forming a campaign committee the same as the threshold in state law.
- Increase the contribution limits for candidate elections.
- Provide for officeholder accounts

Proposal 1: Make the threshold for forming a committee the same as the threshold in state law.

Under local law, a person or combination of persons who have a political purpose, become a committee once they receive contributions of $500 or more, or make expenditures of $500 or more. When they become a committee, they are required to establish a campaign bank account and to file certain bank account information with the City Clerk. Under state law, the threshold for establishing a committee, and reporting campaign activity, is $1,000. Campaign disclosure is governed by state law, and disclosure reports are filed on state forms. Having two separate thresholds is confusing and serves no apparent purpose. This proposal would make the threshold for committee status the same under local law as it is under state law.

Proposal 2: Increase the contribution limits for candidate elections.

San Diego's campaign contribution limits for candidate elections, $250 per person per election, were established by ordinance in 1973, and have remained unchanged since that time. In November 1996, Proposition 208, a proposal with similar contribution limits, was approved by California voters. The proposition was immediately challenged in court, and in January, 1998, Federal District Court Judge Lawrence Karlton found that the anchor provisions were constitutionally infirm and enjoined enforcement of the entire proposition. In its final conclusion on the merits of the case, the court held that "the contribution limits must fail because they are set at a level precluding an opportunity to conduct a meaningful campaign." Judge Karlton singled out the City of San Diego's contribution limits for special comment in his ruling. This is discussed in

the City Attorney's Report to Mayor and Council dated January 28, 1998 (see Attachment B). Among other things, Judge Karlton notes in a footnote:

> Nor is it clear that the existence of limits is a demonstration of their efficacy. The court found concerning San Diego's limits, inter alia, that: "Under the $250 contribution limits in San Diego, the new forms of fundraising that have emerged are self-financing by the candidate, coordinated giving by business employees and illegal money laundering".... Moreover, the court found that: "The experience of the FPPC has been that jurisdictions with contribution limits experience an increase in illegal money laundering."

Since the Campaign Control Ordinance was adopted in 1973, the change in the San Diego consumer price index has been 321%. Adjusting for this change, it would take approximately $1050 in 1998 dollars (the most recent figures available), to equal the value of $250 in 1973. Given Judge Karlton's comments, and confirmation from the Fair Political Practices Commission staff that low contribution limits have resulted in significant money laundering in the region, the City Clerk is recommending that the contribution limits be raised. Tentatively, we would recommend that they be raised to at least $500 per person per election, with subsequent changes tied to the rate of inflation in the consumer price index. The new limits would be established for the elections in 2002, and adjusted every four years thereafter. This would provide the same limits for elections held in all eight City Council offices.

Proposal 3: Provide for Officeholder Accounts

Elected city officials may use excess campaign funds for officeholder expenses. However, an elected city official who is not seeking re-election due to term limits, may not continue to raise funds, unless it is to retire a debt from prior elections or to raise funds for another office. Given that there are certain costs associated with holding office, the City Clerk is recommending the addition of a provision for officeholder accounts.

The provision for officeholder accounts would be modeled after, though not necessarily identical to, provisions contained in Proposition 208. Under such provisions, officeholders would be allowed to establish a segregated account for expenses related to the office they occupy. Officeholders would be allowed to solicit contributions from individuals each calendar year, with a maximum of $10,000 in aggregate contributions to that account each year. We suggest that the limit for contributions be the same as the campaign limits for candidate elections. Funds remaining in the account at the end of the year could be carried over. Campaign expenditures from these accounts would be prohibited, as would transfers to a future election account. Activity in these accounts would be reported regularly on campaign disclosure reports filed in the City Clerk's Office. Upon leaving office, any funds remaining in the account would be required to be turned over to the city's general fund.

SUMMARY

In summary, in Phase 2 of a review and update of the city's election code, the City Clerk is proposing several possible substantive changes to the Nominations Division of the San Diego Municipal Code, and to the Campaign Control Ordinance. The City Clerk is requesting your direction on the specific proposals contained in this report, and welcomes your direction on the consideration of other changes as well.

I look forward to your review of these proposals. Should you have any questions, please contact Deputy Director Joyce Lane at extension 34024.

Sincerely,

Charles G. Abdelnour
City Clerk

CGA:JL

Attachments

cc: City Manager
Assistant City Manager
City Attorney

CANDIDATES & NUMBER OF NOMINATING SIGNATURES REQUIRED
NON-PARTISAN OFFICES

OFFICE	NOMINATING SIGNATURES REQUIRED
State Offices	
Supt. Of Public Instruction	65
Judicial Offices	
Superior Court Judge	20
Municipal Court Judge	20
County Offices	
Assessor/Recorder/County Clerk	20
District Attorney	20
Sheriff	20
Treasurer/Tax Collector	20
Board of Supervisors	20
Non-Charter Cities	
Mayor/City Council	20
School Offices	
County Board of Education	20
County School Districts	-0-
San Diego Community College District	-0-
San Diego Unified School District	200
City of San Diego	
Mayor	300
City Council	200

CANDIDATES & NUMBER OF SIGNATURES REQUIRED
DEMOCRATIC & REPUBLICAN PARTY REQUIREMENTS
PARTISAN OFFICES

OFFICE	NOMINATING SIGNATURES REQUIRED
Federal Offices	
U.S. Senator	65
Representative in Congress	40
State Offices	
Governor	65
Lt. Governor	65
Secretary of State	65
Controller	65
Treasurer	65
Attorney General	65
Insurance Commissioner	65
Member, State Board of Equalization	40
State Legislature	
State Senator	40
State Assembly	40
Local Offices	
County Central Committee	20

Attachment B

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO
Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4199
TELEPHONE (619) 236-6220
FAX (619) 236-7215

January 28, 1998

REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

EFFECT OF PROPOSITION 208 RULING ON
SAN DIEGO'S CAMPAIGN CONTRIBUTION LIMITS

On January 6, 1998, Federal District Court Judge Lawrence K. Karlton found that the anchor provisions of Proposition 208, adopted by California voters in the November 1996 election, were constitutionally infirm. He enjoined enforcement of the entire proposition pending the California Supreme Court's resolution of severability and reformation issues. California Prolife Council Political Action Committee v. Jan Scully, No. S-96-1965, — F. Supp. —, 1998 WL 7173 (E.D. Cal. January 6, 1998). Among other things, Judge Karlton singles out the City of San Diego's campaign contribution limits for special comment. California Prolife Council, 1998 WL 7173, at *10 n.37. Because of the significance of the case and because the court specifically comments on San Diego's laws, we want to give you a brief analysis of the case and its effect on enforcement of the City's laws.

ANALYSIS OF CASE

Plaintiffs challenged Proposition 208 in federal court. No state court had reviewed Proposition 208's constitutionality. As a result, although the federal court invalidated the entire proposition, it acknowledged that some parts were "conceivably" constitutional. California Prolife Council, 1998 WL 7173, at *12. The case was brought by a political action committee (PAC), various labor unions and their PACs, individual contributors to political campaigns, candidates and prospective candidates, officeholders, the Republican and Democratic parties, and two professional slate mailers. The case was defended by the Fair Political Practices Commission (FPPC) and the proponents of the proposition, who acted as intervenors.

Plaintiffs and defendants agreed, and the court found, that the proposition's contribution limits were the linchpin of a complex statutory scheme and that, if the contribution limits failed,

the whole scheme was in doubt. California Prolife Council, 1998 WL 7173, at *5. At trial, in a characterization that became pivotal to the court's ruling, the proponents described the proposition as a "system of 'variable contribution limits.'" California Prolife Council, 1998 WL 7173, at *5. Specifically,

> [t]he statute prohibits any person, broadly defined to include virtually any entity other than a political party and a small contributor committee (as defined by the statute), from contributing more than $100 per election in small local districts (less than 100,000 residents), $250 per election for Senate, Assembly, Board of Equalization and large local districts, and $500 per election for statewide office. Section 85301(a)-(c). These limits are increased to $250, $500 and $1,000, respectively, for candidates who agree to specified expenditure limits. Section 85402.

California Prolife Council, 1998 WL 7173, at *5 (footnote omitted).

The proposition also limits contributions to PACs and to political parties, and places an aggregate limit on the amount any person may contribute to all candidates and political parties combined in a two-year period. Cal. Gov't Code §§ 85301(d), 85303 and 85310; California Prolife Council, 1998 WL 7173, at *5.

A. Standard of Review Applied in Contribution Limit Cases

The court accepted as a given that limits on campaign contributions operate in the First Amendment area. California Prolife Council, 1998 WL 7173, at *6. Previous cases established that contribution limits affect two overlapping and blending fundamental rights—the right of expression and the right of association. California Prolife Council, 1998 WL 7173, at *6. The court determined that even contribution limits "significantly interfering" with these rights will be upheld if the state (1) demonstrates a sufficiently important interest, and (2) employs a measure closely drawn to avoid abridgement of First Amendment freedoms. California Prolife Council, 1998 WL 7173, at *6, citing Buckley v. Valeo, 424 U.S. 1, 25 (1976). The court specifically determined that laws limiting campaign contributions such as Proposition 208 are not required to undergo the most stringent judicial scrutiny that has been applied to some laws that infringe First Amendment rights, for example, to laws that limit independent expenditures. California Prolife Council, 1998 WL 7173, at *6, 9.

B. Legitimacy of Governmental Interests Justifying Proposition 208's Contribution Limits

Plaintiffs mounted a three-pronged attack against the proposition. They challenged (1) whether the governmental interests asserted to justify the proposition were legitimate, (2) whether the proposition was narrowly drawn to address those interests, and (3) whether the proposition affected First Amendments rights not only of contributors but also of candidates in such a way as to impermissibly limit effective advocacy.

The United States Supreme Court had previously recognized two legitimate state interests justifying contribution limits: (1) the interest in preventing corruption or the appearance of corruption, and (2) the interest in "limiting the corrosive and distorting effects of immense aggregations of wealth with the help of the corporate form that have little or no correlation to the public's support for the corporation's ideas." California Prolife Council, 1998 WL 7173, at *7, citing Federal Election Comm'n v. Nat'l Conservative Political Action Committee, 470 U.S. 480, 496-97 (1985); Austin v. Michigan Chamber of Commerce, 494 U. S. 652, 660 (1990).

In striking down Proposition 208, based on evidence presented at trial, the court found actual corruption had occurred in California legislative races (but the judge specifically mentioned he had heard no evidence of actual corruption in election of persons to the state's executive or judicial branches). California Prolife Council, 1998 WL 7173, at *8. The judge found other evidence to support the electorate's apparent interest and belief in the importance of preventing not only actual corruption, but also the appearance of corruption. The court concluded, therefore, that there was a legitimate governmental interest served by limitations on campaign contributions. California Prolife Council, 1998 WL 7173, at *8.

C. Whether the Variable Contribution Limits Were Closely Drawn to Address the Interest

The court's next task was to determine whether Proposition 208's contribution limits were sufficiently "closely drawn" to serve the asserted governmental interests. The court applied the "closely drawn" test in this contributions limits case as opposed to the more stringent "less restrictive means" test, which is the test the United States Supreme Court has applied to other types of laws that infringe First Amendment rights. In applying the test, the court was particularly troubled by the fact that, under Proposition 208, contribution limits could be doubled by a candidate agreeing to spending limits in his or her campaign. California Prolife Council, 1998 WL 7173, at *8-9. The court concluded that the lower contribution limits in Proposition 208's variable limit scheme were not closely drawn and, therefore, were constitutionally infirm. California Prolife Council, 1998 WL 7173, at *9. The court held that the electorate's adoption of variable contribution limits meant the voters had necessarily concluded that the higher limit adequately addressed the governmental interest in preventing corruption. California Prolife Council, 1998 WL 7173, at *9. This, in the judge's opinion, required the court to find that the

lower limits were not narrowly drawn to meet a legitimate governmental interest. Id. Therefore the lower campaign contribution limits are constitutionally infirm. Id.

D. Whether Proposition 208's Contribution Limits Impermissibly Limited Effective Advocacy by Contributors and Candidates

Upon examination of the third prong of plaintiffs' attack, the court found another constitutional infirmity in Proposition 208. Plaintiffs asserted that Proposition 208 set contribution limits so low that "candidates will not be able to marshal sufficient assets to campaign effectively." California Prolife Council, 1998 WL 7173, at *10. After reviewing a "wealth of factual and opinion evidence" in support of plaintiffs' position, the court observes there are

> myriad facts which, taken together, require the court to conclude that on the record made at trial the effect of the initiative is not only to significantly reduce a California candidate's ability to deliver his or her message, but in fact to make it impossible for the ordinary candidate to mount an effective campaign for office.

California Prolife Council, 1998 WL 7173, at *10.

In so holding, the court rejected defendants' arguments, which were based in part on evidence that other states have similar or lower campaign contribution limits and that the City of San Diego has campaign limits comparable to those found in the initiative. Although he found defendants' arguments "not without substance," the court concluded that they could not prevail against plaintiffs' evidence. California Prolife Council, 1998 WL 7173, at *10.

Defendants first argued that the limits approved in Buckley v. Valeo and limits adopted in other states and cities defeated plaintiffs' claims. The court disagreed. The court stresses that it relied heavily on the record before it in concluding that "the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *10 (footnote omitted). In fact, the existence of an extensive record in this case distinguishes it from Buckley v. Valeo, in which there was simply no record indicating whether the campaign contributions limits in the federal law would have had a "dramatic adverse effect on the funding of campaigns and political associations." California Prolife Council, 1998 WL 7173, at *10, citing Buckley v. Valeo, 424 U.S. at 21. Buckley v. Valeo "contrasts with the instant record where the court has concluded that the contribution limits will prevent the marshaling of assets sufficient to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *10.

The judge also rejected defendants' arguments that were based on the existence of other comparable state or local contribution limits, saying his conclusion was not "undermined by the existence of campaign limits in other jurisdictions." California Prolife Council, 1998 WL 7173, at *10. "The facts pertinent to each jurisdiction, such as the size of the district, the cost of media, printing, staff support, news media coverage, and the divergent provisions of the various statutes and ordinances undermines the value of crude comparisons." California Prolife Council, 1998 WL 7173, at *10. Whether a particular jurisdiction's law prevents candidates from effective advocacy "'is fact-dependent, drawn from all of the record evidence and an evaluation of the witnesses' credibility.'" California Prolife Council, 1998 WL 7173, at *10, quoting National Black Police Assn v. District of Columbia Bd. of Elections and Ethics, 924 F. Supp. 270, 281 (D.D.C. 1996), vacated as moot 108 F.3d 346 (1997). "[E]very jurisdiction is *sui generis,* and thus every campaign contribution limitation must be judged on its own circumstances." California Prolife Council, 1998 WL 7173, at *10, citing The City of San Diego laws in footnote 37.

Defendants asked the court to apply the general rule that courts should not second guess a legislative determination concerning where the line for contribution limits should be drawn. California Prolife Council, 1998 WL 7173, at *7, 11. Plaintiffs argued, "[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say a $2,000 ceiling might not serve as well as a $1,000. Such distinctions in degree become significant only when they can be said to amount to differences in kind." California Prolife Council, 1998 WL 7173, at *7, quoting Buckley v. Valeo, 424 U.S. at 30. The court gave short shrift to this argument and held that the initiative commanded a change in kind, not simply in degree. California Prolife Council, 1998 WL 7173, at *11.

Finally, defendants argued that the court should defer to the predictive judgment of the electorate that necessarily is to be implied from its adoption of Proposition 208. Giving serious consideration to this argument, the court examined the amount of deference a court must give to the electorate by analogizing it to the amount a court must give to a legislative body. The court decided it must apply California's "sliding scale" test of deference, that is, accord significant deference to economic judgments but employ "greater judicial scrutiny" when the law impinges on a constitutional right. California Prolife Council, 1998 WL 7173, at *11.

> [D]eference in the federal courts is not simply a function of the separation of powers doctrine. It also rests upon the legislative branch being "better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon . . . complex and

> dynamic" issues . . . . [G]iven that the statutes at bar are the product of the initiative process, their adoption did not enjoy the fact gathering and evaluation process which in part justifies deference.

California Prolife Council, 1998 WL 7173, at *11 (citation omitted).

In the end, the court granted limited deference to the electorate's "implied findings" in adopting Proposition 208, and stressed that deference did not preclude meaningful judicial review. California Prolife Council, 1998 WL 7173, at *12. The court was faced with a wealth of strong evidence directly contradicting the "implied findings" he found in the electorate's actions, and the court "made factual findings as to the ability of candidates to marshal sufficient assets to effectively communicate" under California's campaign laws. California Prolife Council, 1998 WL 7173, at *12. The court concluded that the evidence commanded "a conclusion inconsistent with the implicit legislative finding" and that the "implied finding cannot stand even after according it due deference." California Prolife Council, 1998 WL 7173, at *12.

In its final conclusion on the merits of the case, the court held that "the contributions limits must fail because they are set at a level precluding an opportunity to conduct a meaningful campaign." California Prolife Council, 1998 WL 7173, at *12.

E. Severability of Proposition 208's Anchor Provisions from Other "Conceivably" Constitutional Provisions

The court called into question several other provisions of Proposition 208 because they appeared to be "justified solely on the basis that they are required to prevent subversions of the campaign limitation provisions." California Prolife Council, 1998 WL 7173, at *12. The court specifically mentioned that the limitations on contributions to and from political parties (sections 85303 and 85304), to and from PACs (sections 85301 and 85309), the aggregate limitations (section 85310), and the transfer ban (section 85306) cannot stand since their justifying provision is unconstitutional. California Prolife Council, 1998 WL 7173, at *12. The judge also said that other provisions, for example, the spend down provisions (section 89519), the prohibition on the use of campaign funds for office expenditures, (section 85313), the provisions concerning disclosure in advertising (sections 84501 through 84510), and the provisions concerning slate mailers (section 84305.5) appear to have separate justifications for their adoption and therefore "conceivably are constitutional," if they could be severed from the tainted portions. California Prolife Council, 1998 WL 7173, at *12. The court found that severability and reformation (rewriting) were matters for the state courts to decide, and as part of his order he directed the

defendants to seek an original writ in the California Supreme Court to determine whether severability and reformation were proper. California Prolife Council, 1998 WL 7173, at *13.

Because of outstanding issues regarding severability and reformation, the court determined that temporary, but not permanent, injunctive relief was appropriate. The court enjoined the FPPC from enforcing any provision of Proposition 208 pending further order of the federal district court. California Prolife Council, 1998 WL 7173, at *15. The FPPC has since issued a press release saying it will seek an appeal of the U.S. District Court's decision to the Ninth Circuit Court of Appeals, but that it would not seek a stay of Judge Karlton's decision. Cal. Fair Political Practices Comm'n., FPPC Will Appeal Proposition 208 Decision (press release Jan. 15, 1998).

F. Summary of San Diego's Contribution Limits

The City of San Diego's campaign finance laws are set forth in chapter II, article 7, division 29 of the San Diego Municipal Code. SDMC §§ 27.2901-27.2975. Section 27.2941 sets forth a contribution limit of $250 per election to candidates, campaign committees and independent expenditure committees, whereas section 27.2947 prohibits campaign contributions from anyone except an individual. Section 27.2941 reads in relevant part:

> (a) It is unlawful for a candidate, committee supporting or opposing a candidate, or person acting on behalf of a candidate or committee to solicit or accept from any person a contribution which will cause the total amount contributed by that person in support of or opposition to a candidate to exceed two hundred fifty dollars ($250) for any single election.
>
> (b) It is unlawful for any person to make to any candidate or committee supporting or opposing a candidate a contribution that will cause the total amount contributed by that person in support of or opposition to a candidate to exceed two hundred fifty dollars ($250) for any single election.
>
> . . . .

> (d) For purposes of Section 27.2941(a) and (b), the term "committee" includes but is not limited to a committee that makes independent expenditures.

SDMC § 27.2941.

Section 27.2947 reads in relevant part:

> (a) It is unlawful for a candidate, committee, committee treasurer or other person acting on behalf of a candidate or committee to accept a contribution from any person other than an individual.
>
> (b) It is unlawful for a person other than an individual to make a contribution to any candidate or committee . . . .

SDMC § 27.2947.

G. Effect of Ruling on San Diego's Contribution Limits

As mentioned above, the court devoted a footnote to San Diego's contribution limits. The footnote reads:

> Nor is it clear that the existence of limits is a demonstration of their efficacy. The court found concerning San Diego's limits, inter alia, that: "Under the $250 contribution limits in San Diego, the new forms of fundraising that have emerged are self-financing by the candidate, coordinated giving by business employees and illegal money laundering". . . . Moreover, the court found that: "The experience of the FPPC has been that jurisdictions with contribution limits experience an increase in illegal money laundering."

California Prolife Council, 1998 WL 7173, at *10 n.39, citing Findings of Fact Nos. 117, 118, California Prolife Council Political Action Committee v. Jan Scully, No. S-96-1965 (E.D. Cal. January 6, 1998) (visited Jan. 13, 1998) <http://www. caed.uscourts.gov/208fin.htm>.

The court made these remarks while discussing the third prong of plaintiffs' case, that is, in the context of deciding whether Proposition 208's contribution limits were so low that they effectively precluded a meaningful campaign. By implication the judge is raising that same question with respect to the City of San Diego's limits.

The court also made several specific findings about the City of San Diego, many of which cast doubt on the constitutionality of San Diego's contribution limits. The findings that specifically mention the City of San Diego are as follows:

> 110. The City of San Diego has since 1973 had a $250 per election limit on contributions to candidates, and in addition bans contributions from non-individuals, including corporations, labor unions, and PACs. The city's population (approximately 1.2 million) is roughly three times the size of a state assembly district (404,000), and one and one half times the size of a state senate district (808,000).
>
> 111. Candidates for city-wide office in San Diego having special advantages have raised large sums of money and run effective campaigns. For example, in Susan Golding's successful 1992 race for the open seat of Mayor of San Diego, she received over $1.1 million in contributions (approximately $385,000 for the primary election and $743,000 for the general election.)
>
> 112. The evidence demonstrated only 8 or 9 of approximately 88 San Diego city candidates since 1989 raised substantial campaign funds under the $250 limits.
>
> 113. Each of the candidates able to raise funds under the San Diego limits had special circumstances that made such fundraising possible.
>
> 114. Unlike State legislative races, San Diego City elections are generally high profile races that receive a great deal of media coverage from the newspaper, television and radio, thus helping candidates become known to potential contributors.
>
> 115. Due to the lack of media coverage, State legislative candidates are less likely to be able to raise funds under $250 limits than the San Diego candidates.
>
> 116. The $250 contribution limits in San Diego have given an advantage to candidates with personal wealth.
>
> 117. Under the $250 contribution limits in San Diego, the new forms of fundraising that have emerged are self-financing by the candidate, coordinated giving by business employees and illegal money laundering.
>
> . . . .

119. Among other effects of San Diego's contribution limits has been a marked increase in money laundering activities.

120. Independent expenditures have been on the increase in San Diego City races.

121. Corruption and the appearance of corruption were not reduced in the City of San Diego by the enactment of a $250 contribution limit for municipal elections.

Findings of Fact Nos. 110-121, California Prolife Council (No. S-96-1965).

In these findings, the court's primary focus was on the amount of money an individual may contribute to a campaign. San Diego's laws include other types of contribution limits. Significantly, the court noted in particular that San Diego prohibits contributions from non-individuals, including corporations, labor unions and PACs. Findings of Fact No. 110, California Prolife Council (No. S-96-1965). Although not mentioning any particular jurisdiction's laws, elsewhere he made another finding about limits on contributions to independent expenditure committees,[1] which is another type of contribution limit in San Diego's laws. Therefore, not only are San Diego's monetary limits called into question, so are its prohibitions against organizational contributions and its limits on contributions to independent expenditure committees.

H. Factors Distinguishing San Diego's Laws from Proposition 208 and the Court's Ruling on the Proposition

Although the court cast doubt on the City of San Diego's contribution limits, the court in fact made no ruling on San Diego's laws. San Diego's laws remain valid until a court rules otherwise. Several factors distinguish San Diego's laws from Proposition 208 and from the judge's analysis and ruling on the proposition.

---

[1] Finding number 196 reads: "Contributions to independent expenditure committees are not necessarily corrupting, nor do they necessarily give the appearance of corruption." Findings of Fact No. 196, California Prolife Council (No. S-96-1965).

1. San Diego does not have variable limits.

San Diego's contribution limits are set at $250 per candidate per election. In contrast, Proposition 208's limits were variable. The court determined that the electorate had impliedly found that the higher limits in some instances—when candidates agreed to accept spending limits —met the governmental interest in preventing corruption. By finding the higher limits adequately served that purpose in some instances, the electorate necessarily was held to have forfeited the argument for the necessity of the lower limits. California Prolife Council, 1998 WL 7173, at *8-9. San Diego's laws are not subject to attack on those grounds.

2. There has been no evidentiary hearing on San Diego's laws.

As Judge Karlton repeatedly stressed, especially in his remarks on the third prong, his conclusions were based heavily on the evidentiary record made at trial on Proposition 208. California Prolife Council, 1998 WL 7173, at *8, 10, 12. Although testimony about San Diego's laws was presented in the 208 trial, San Diego's laws were not at issue in the case and the evidentiary record was not developed with San Diego's laws in mind. The arguments for and against the validity of San Diego's laws were simply not fully litigated at the trial on Proposition 208. To date, San Diego has not had an opportunity to demonstrate in court that its laws meet a constitutionally valid purpose, are narrowly drawn to meet that purpose, and that its limits are not so low as to preclude a meaningful election campaign. San Diego's laws can be fairly judged on their merits only after a full evidentiary hearing.

3. A court should defer to the City Council's judgment in adopting its campaign finance laws, because an extensive legislative record supports those laws.

After lengthy discussion, Judge Karlton granted limited deference to the electorate's "implied findings" in adopting Proposition 208. California Prolife Council, 1998 WL 7173, at *11. Precisely because the initiative was adopted by the voters rather than by a legislative body, there was a dearth of express legislative findings to support the record. In contrast with Proposition 208, San Diego's laws have been adopted and amended by numerous City Councils since 1973. An extensive legislative record supporting the reasons for the laws is available to support the validity of the legislation.

4. San Diego's laws prohibiting organizational contributions and limiting contributions to independent expenditure committees were not before the court.

Judge Karlton's comments regarding San Diego's prohibitions against organizational contributions were dicta, Findings of Fact No. 110, California Prolife Council (No. S-96-1965), that is, they were not essential to any issue raised in the case and were gratuitously offered.

Prohibitions and limitations on organizational contributions and expenditures have been specifically upheld previously by the courts. See, e.g., Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 660 (1990); California Medical Ass'n v. FEC, 453 U.S. 182 (1981).

The judge stated that contributions to independent expenditure committees are not necessarily corrupting. Findings of Fact No. 196, California Prolife Council (No. S-96-1965). In other words, the judge thinks as a general rule that limits on contributions to independent expenditure committees do not serve a legitimate governmental purpose. The judge did not make this remark about San Diego's or any other particular jurisdiction's law. But, because Judge Karlton made this finding, it raises the question whether this type of limit is valid, including the limits in San Diego.

Again we point out that no evidence was presented to Proposition 208's trial judge on the validity of these two aspects of San Diego's laws. There are strong factual and legal arguments in favor of upholding these two portions of San Diego's laws. Unless a court, after a full hearing, rules San Diego's laws invalid, they continue to be enforceable.

I. Next Step

My staff is currently evaluating our options. As the Enforcement Authority for the City's campaign ordinances, I am considering the filing of a legal action to resolve any questions about the constitutionality of the City's $250 contribution limits. We are consulting as well with other jurisdictions around the state that are faced with similar questions.

As soon as we come to a decision, I will inform you promptly.

Respectfully submitted,

CASEY GWINN
City Attorney

CCM:jrl:011(043.1)
RC-98-3

s:\PLAFORMS\PROP208